**IN THE**
**MISSOURI COURT OF APPEALS**
**SOUTHERN DISTRICT**

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| **ERIC HUMPHREY,** | ) | |
| | ) | |
| **Plaintiff/Respondent,** | ) | |
| | ) | |
| **vs.** | ) | **Case No. SD25744** |
| | ) | |
| **CHARLES GLENN AND DALE GLENN** | ) | |
| **dba C & D GLENN FARMS,** | ) | |
| | ) | |
| **Defendants/Appellants.** | ) | |

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**Appeal from the Circuit Court of Mississippi County, Missouri**
**Honorable David A. Dolan, Circuit Judge**

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# BRIEF OF APPELLANTS
# CHARLES GLENN AND DALE GLENN dba C & D GLENN FARMS

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## JURISDICTIONAL STATEMENT

This action is an appeal from a judgment entered on a jury verdict on a premises liability claim in the Circuit Court of Mississippi County by the Honorable David A. Dolan. (L.F. 79-80) The jury entered a verdict for Plaintiff, awarding $100,000.00 damages and assessing 50% fault to the Defendants and 50% fault to the Plaintiff. (L.F. 76) The trial court overruled the Defendants' post-trial motions and Defendants filed their appeal. (L.F. 5-6; 117-126) The issues for appeal involve the sufficiency of the evidence and instructional error in the verdict directing instruction.

This appeal is within the general appellate jurisdiction of the Missouri Court of Appeals, as provided by Article V, Section 3 of the Constitution of the State of Missouri. This appeal does not involve the construction of the Constitution of the State of Missouri, the validity of a present statute of this State, nor the construction of a revenue law. Further, the Circuit Court of Mississippi County, wherein this judgment was rendered, is within the Southern District of Missouri as provided by Section 477.060 RSMo 2000.

## STATEMENT OF FACTS

This appeal is from a premises liability claim for injuries Plaintiff received as a result of a four wheel ATV accident that occurred while he was trespassing on land possessed by the Defendants Charles Glenn and Dale Glenn dba C & D Glenn Farms. The issues for appeal relate only to liability and damages are not disputed. As a result, the following statement of facts sets forth those facts related to liability and does not set forth facts related to damages.

Defendants Charles Glenn and Dale Glenn are farmers in Mississippi County, Missouri dba C & D Glenn Farms. (Tr. 22, 123, 196) Since 1994, Defendants have leased farm property owned by Burke Dodson referred to as "Greenfield" located in Mississippi County, Missouri. (Tr. 19, 22-23, 124, 196) From the levee road, Greenfield has two entrances -- referred to as the north entrance and the south entrance -- approximately a mile and a half apart. (Tr. 32, 38, 42-44) Like most field roads on farms coming off the levee, the field road at each entrance of Greenfield has a wire cable across it to keep out trespassers. (Tr. 43-44, 141, 192) Each field road has trees marked with purple paint to warn trespassers to stay off the property. (Tr. 35, 40-42, 45-48, 62, 126-127, 198, 206)

The wire cable blocking the private road on the south entrance to Greenfield was placed between some trees, marked with purple paint on the post holding the cable, and the cable was anchored down in the middle at a height of app. 2 foot. (Tr. 129-132, 192, 201) From the top of the levee down to the cable is 420 feet. (Tr. 42, 202) There is a cottonwood tree marked with purple paint between the levee and the cable. (Tr. 40-41)

On October 7, 2000, Plaintiff Eric Humphrey was operating a four wheel ATV with a passenger, Laura Chimienti, riding along. (Tr. 63-64, 83, 104, 144) Plaintiff was also accompanied by his brother, Terry Humphrey, who was operating another four wheel ATV with a passenger, Josh Nelson. (Tr. 64, 83-84, 103-104, 144) After "four-wheeling" for several hours they were running low on gas and were looking for a short cut to get to a gas station that they thought was nearby. (Tr. 66, 90-92, 147-148) The four-wheelers turned onto the north entrance of Greenfield and when they came upon the wire cable blocking the field road they turned around and went back up to the levee road. (Tr. 74-75, 113) Plaintiff, his brother, and his brother's passenger were aware that farmers put up cables, gates, barricades, and the like to keep people from trespassing. (Tr. 98, 115, 168)

Shortly before 5:30 pm, the four-wheelers traveled off the levee road onto the private road on the south entrance of Greenfield. (Tr. 104, 145) As Plaintiff and his friends were trespassing on defendants' farmland, Plaintiff was operating the ATV at approximately 25-30 mph approximately 15 feet in front of the ATV operated by his brother. (Tr. 73-74, 97, 112) The passenger on the ATV operated by Plaintiff's brother saw the wire cable across the road and yelled for them to stop. (Tr. 86) The passenger on the ATV operated by Plaintiff saw the wire cable when it was app. 2 feet in front of them and yelled at Plaintiff who turned his head. (Tr. 69, 81) Plaintiff did not see the wire cable before running into it and he was "clotheslined" resulting in physical injury. (86, 94, 110, 156)

## Procedural History

On September 27, 2001, in the Circuit Court of Mississippi County, Missouri, Plaintiff filed a premises liability claim against Defendants Charles Glenn and Dale Glenn dba C & D Glenn Farms for damages Plaintiff suffered as a result of the four wheeler accident. (L.F. 1, 7-13) Defendants filed their answer denying liability and alleging comparative fault by Plaintiff. (L.F. 3, 19-23)

On May 23, 2003, the matter proceeded to jury trial. (L.F. 4) Plaintiff proceeded to trial against Defendants on a claim based on a combination of the "hard-by" rule (MAI 22.02), *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo.banc 1993), *Politte v. Union Elec. Co.*, 899 S.W.2d 590 (Mo.App.E.D. 1995), and the Restatement (Second) of Torts §335 (1965). The trial court denied the Defendants' motions for directed verdict at the close of the plaintiff's evidence and at the close of all the evidence. (L.F. 4, 47-50, 51-54; Tr. 185-186, 209) The Defendants' objected to Instruction No.8, the verdict directing instruction, which Plaintiff offered as MAI 22.02 modified in accordance with the Restatement (Second) of § Torts 335 - an exception to the general rule of no duty to trespassers. (L.F. 4-5, 64, 68-73; Tr. 211-213) In overruling the motions for directed verdict and in allowing Instruction no. 8, the trial court stated that he would not submit the case on the hard-by rule but that he would submit the case based on section 335 even though it had not been adopted in Missouri in order to allow the appellate court to review the issue. (Tr. 186, 209, 212)

The jury entered a verdict for Plaintiff, awarding $100,000.00 actual damages and assessing 50% fault to the Defendants and 50% fault to the Plaintiff. (L.F. 5, 76) On May

30, 2003, the trial court entered judgment on the jury's verdict. (L.F. 5, 79-81) On June 4, 2003, the Defendants' filed their Motion for Judgment Notwithstanding the Verdict or in the alternative Motion for New Trial. (L.F. 5, 82-107) On July 8, 2003, the trial court heard and denied the Defendants' post-trial motions. (L.F. 5) On July 15, 2003, Defendants filed their notice of appeal. (L.F. 6; 117-126)

## POINTS RELIED ON

### I.

**The trial court erred in denying the Defendants' motion for directed verdict and motion for judgment notwithstanding the verdict because (1) Defendants did not owe plaintiff any duty with regard to the condition of their land, (2) Plaintiff failed to prove any recognized exception to the general rule that possessors of land are not liable to trespassers for conditions on the land, and (3) Plaintiff failed to make a submissible case under the exception stated in the Restatement (Second) of Torts, § 335 in that (1) Plaintiff was a trespasser, (2) Section 335 of the Restatement (Second) of Torts has not been adopted in Missouri, and (3) the facts do not fit the requirements of section 335 as there was (a) no evidence of constant trespassers in the limited area where plaintiff was injured, (b) the wire cable in and of itself was not a dangerous condition likely to cause death or serious bodily harm to trespassers but rather it was plaintiff's conduct that caused the danger, (c) the wire cable was not a hidden peril and was discoverable by trespassers and (d) the wire cable was a condition inherent to farm land in the area and it was readily observable by a trespasser paying proper attention to his surroundings.**

***Hogate v. American Golf Corp.*, 97 S.W.3d 44 (Mo.App. 2003)**

***Mothershead v. Greenbriar Country Club*, 994 S.W.2d 80 (Mo.App.E.D. 1999)**

***Politte v. Union Elec. Co.*, 899 S.W.2d 590 (Mo.App.E.D. 1995)**

***Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo.banc 1993)**

**Restatement (Second) of Torts, § 335 and comment *f***

**II.**

**The trial court erred in denying the motion for new trial because an instruction that does not accurately state the substantive law of the theory of liability that is the basis for the verdict and that misdirects, misleads or confuses is prejudicial error in that Instruction No. 8, the verdict directing instruction, did not follow the substantive law of section 335 as it modified the requirement that "trespassers *constantly* intrude upon a limited area of land" to "trespassers *frequently* intruded upon the South entrance to Greenfield" and as a result allowed the jury to enter a verdict without making all the necessary factual findings under section 335.**

***Duncan v. First State Bank of Joplin,* 848 S.W.2d 566 (Mo.App.S.D. 1993)**

***Hogate v. American Golf Corp.,* 97 S.W.3d 44 (Mo.App. 2003)**

***Politte v. Union Elec. Co.,* 899 S.W.2d 590 (Mo.App.E.D. 1995)**

***Seward v. Terminal R.R. Ass'n,* 854 S.W.2d 426 (Mo.banc 1993)**

**Missouri Rule of Civil Procedure 70.02**

**Restatement (Second) of Torts, § 335**

## ARGUMENT

This appeal is from a premises liability claim for injuries Plaintiff received as a result of a four-wheeler accident that occurred when Plaintiff drove into a wire cable blocking a private road while trespassing on land possessed by the Defendants. (L.F. 10-12) The jury entered a verdict for Plaintiff, awarded $100,000.00 damages, and assessed 50% fault to the Defendants and 50% to the Plaintiff. (L.F. 76) The issues for appeal involve (Point I) sufficiency of the evidence as to premises liability and (Point II) error in Instruction No. 8, the verdict directing instruction.

### I.

**The trial court erred in denying the Defendants' motion for directed verdict and motion for judgment notwithstanding the verdict because (1) Defendants did not owe plaintiff any duty with regard to the condition of their land, (2) Plaintiff failed to prove any recognized exception to the general rule that possessors of land are not liable to trespassers for conditions on the land, and (3) Plaintiff failed to make a submissible case under the exception stated in the Restatement (Second) of Torts, § 335 in that (1) Plaintiff was a trespasser, (2) Section 335 of the Restatement (Second) of Torts has not been adopted in Missouri, and (3) the facts do not fit the requirements of section 335 as there was (a) no evidence of constant trespassers in the limited area where plaintiff was injured, (b) the wire cable in and of itself was not a dangerous condition likely to cause death or serious bodily harm to trespassers but rather it was plaintiff's conduct that caused the danger, (c) the wire cable was not a hidden peril and was discoverable by trespassers and (d) the**

**wire cable was a condition inherent to farm land in the area and it was readily observable by a trespasser paying proper attention to his surroundings.**

For Point I, the Defendants challenge the trial court's denial of the motion for directed verdict and the motion for judgment notwithstanding the verdict on the basis that Plaintiff failed to make a submissible case of premises liability because at the time of Plaintiff's injury he was a trespasser on Defendants' land to whom no duty was owed and Plaintiff did not prove that he fell within any exception to the general rule that possessors of land are not liable to trespassers for conditions on the land.

In reviewing the denial of a motion for judgment notwithstanding the verdict, the appellate court considers whether the plaintiff made a submissible case. *Hogate v. American Golf Corp.*, 97 S.W.3d 44, 46 (Mo.App. 2003). "In order to make a submissible case, plaintiff must present substantial evidence to establish every fact essential to liability." *Id.* The appellate court views the evidence in the light most favorable to the verdict and presumes that the plaintiff's evidence is true and disregards any of defendant's evidence that does not support the verdict. *Id.* Where the denial of a directed verdict or JNOV is based upon a matter of law, the appellate court reviews the trial court's decision *de novo*. *Trinity Lutheran Church v. Lipps,* 68 S.W.3d 552, 557 (Mo.App.E.D.2002).

"[W]hether a duty exists is a question of law for the court to decide." *Boyette v. Trans World Airlines*, 954 S.W.2d 350, 354 (Mo.App.E.D. 1997). The duty of care that a landowner or possessor of land owes to a person entering onto his land is controlled by the legal status of the person entering the land. *Mobley v. Webster Electric Coop.*, 859

S.W.2d 923, 928 (Mo.App.S.D. 1993). Missouri classifies individuals entering onto another's land as ***trespassers***, ***licensees***, or ***invitees***. *Boyette*, 954 S.W.2d at 355. The status of an entrant onto land is determined at the time of injury. *Id.* In *Carter v. Kinney*, 896 S.W.2d 926 (Mo. banc 1995), the Missouri Supreme Court stated:

> All entrants to land are trespassers until the possessor of the land gives them permission to enter. All persons who enter a premises with permission are licensees until the possessor has an interest in the visit such that the visitor 'has reason to believe that the premises have been made safe to receive him.'

*Carter*, 896 S.W.2d at 928.

A trespasser is one who enters without consent or privilege. *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426, 428 (Mo. banc 1993); *Mothershead v. Greenbriar Country Club*, 994 S.W.2d 80, 86 (Mo.App.E.D. 1999). A person "who enters onto the property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in the performance of any duty to the owner or person in charge or on any business of such person, but merely for his own purposes, pleasure or curiosity is a trespasser." *Boyette*, 954 S.W.2d at 355 *citing McVicar v. W.R. Arthur & Co.*, 312 S.W.2d 805, 812 (Mo. 1958).

A trespasser is owed no duty with regard to the condition of the land. *Mobley v. Webster Electric Coop.*, 859 S.W.2d 923, 928 (Mo.App.S.D. 1993); *Hogate v. American Golf Corp.*, 97 S.W.3d 44, 48 (Mo.App.E.D.2003); *Mothershead v. Greenbriar Country Club*, 994 S.W.2d 80, 86 (Mo.App.E.D. 1999). This rule is not based on the wrongful nature of the trespasser's conduct, but on the possessor's inability to foresee the

trespasser's presence and guard against injury. *Seward*, 854 S.W.2d at 428; *Hogate*, 97 S.W.3d at 44; *Mothershead*, 994 S.W.2d at 86.

While the possessor of land may not intentionally set booby traps with the design of causing injury, the possessor owes no duty to adult trespassers for conditions of the premises. *Cochran v. Burger King Corp.*, 937 S.W.2d 358, 364 (Mo.App.W.D. 1997). "Trespassers take the premises, for better or for worse, as they find them, assuming the risk of injury from their condition, 'the owner being liable only for hidden dangers intentionally placed to injure them or for any willful, illegal force used against them.'" *Politte v. Union Electric Co.*, 899 S.W.2d 590, 592 (Mo.App.E.D. 1995). "This is the rule whether the trespasser is known or unknown" *Id.*

It is undisputed that Plaintiff was a trespasser on Defendants' property. (Tr. 75, 118, 167, 170-171) "Unless a trespasser can demonstrate that he falls within one of the clearly defined exceptions to the general rule, a possessor of land is not liable for harm caused by the failure to put his land in a reasonably safe condition." *Seward*, 854 S.W.2d at 428. Section 335 of the Restatement (Second) of Torts states an exception to the general rule as to trespassers. Plaintiff relied on the exception stated in section 335 in submitting his claim to the jury.

Section 335 of the Restatement (Second) of Torts has not been either adopted or rejected by Missouri courts. *Seward*, 854 S.W.2d at 429; *Hogate*, 97 S.W.3d at 49. The trial court acknowledged that section 335 has not been adopted in Missouri but stated that he would allow the case to be submitted based on that exception and allow the appellate

court to review the issue. (Tr. 186, 209, 212) Section 335 of the Restatement (Second) of Torts provides:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of land, is subject to liability for bodily harm caused to them by an artificial condition on the land if,
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
>
> (iii) is of such a nature that he had reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

*Restatement (Second) of Torts, §335 (1965).*

Regardless of whether Section 335 has been adopted in Missouri, the facts of this case do not meet the requirements of Section 335. Section 335 has been discussed in five appellate cases but the courts have found it unnecessary to determine whether Missouri has adopted that provision of the restatement based on a finding that the facts of the various cases have failed to meet the requirements. *See*, *Seward*, 854 S.W.2d at 429-430; *Hogate*, 97 S.W.3d at 49; *Mothershead*, 994 S.W.2d at 87; *Politte*, 899 S.W.2d at 593; *Cochran*, 937 S.W.2d 364-365. In three of the cases the appellate court reversed a jury verdict in favor of the plaintiff, in one summary judgment for the defendant was affirmed,

and in one a directed verdict for the defendant was affirmed. *See, Seward*, 854 S.W.2d at 429-430; *Hogate*, 97 S.W.3d at 49-50; *Mothershead*, 994 S.W.2d at 87-88, 90; *Politte*, 899 S.W.2d at 593; *Cochran*, 937 S.W.2d 364-366.

In *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo. banc 1993) the Supreme Court found that even if Missouri had adopted section 335 the evidence was not sufficient to establish "constant trespassing on a limited area." *Seward*, 854 S.W.2d at 429. The Supreme Court reversed the jury verdict for the plaintiff, holding that the plaintiff was a trespasser to whom no duty was owed and no exception to the general rule applied. *Id.* at 430. In *Seward*, the plaintiff was injured when he fell through an opening in a bridge abutment. *Id.* at 427. There was evidence that the defendant knew of trespassers "roaming at large" on the bridge, frequently trespassing on the rail deck of the bridge. *Id.* at 429-430. The defendant was aware of one prior intrusion in the bridge abutment that had resulted in an injury. *Id.* In finding the evidence that people roamed at large on the bridge and one prior injury in the area of plaintiff's injury insufficient to establish "constant trespassing on a limited area" the court stated:

> Before a duty arises, the defendants must have some notice that 'persons constantly and persistently intrude upon some *particular place* within the land. It is not enough that he know or have reason to know that persons persistently roam at large over this land.

*Seward*, 854 S.W.2d at 429-430 (emphasis in original). On the issue of "should know" the court stated that it is based on "facts within his knowledge" and it "requires a possessor 'only to draw reasonably correct conclusions from data known to him, and [the

possessor] is not required to exercise a reasonable attention to his surroundings or to make any inspection or investigation in regard to them.'" *Id.* at 430.

In *Politte v. Union Electric Co.*, 899 S.W.2d 590 (Mo.App.E.D. 1995) the Eastern District questioned whether Missouri had adopted section 335 but found it unnecessary to address that issue as the facts of that case failed to meet the requirements of section 335. *Politte*, 899 S.W.2d at 593. In *Politte*, the plaintiff was severely shocked while climbing on one of defendant's high voltage electrical transmission towers. *Id*. The appellate court upheld a directed verdict for the defendant finding that the plaintiff could not make a submissible case under section 335 for several reasons. *Id.* First, the court found that evidence of intrusions four years prior to plaintiff's injury did not show that the possessor of the land knew or should have known of constant intrusion on the land. *Id.* Second, the intrusions that were shown did not involve the artificial condition by which plaintiff received his injury. *Id.* Third, there was "nothing to warrant a conclusion that defendant would believe trespassers would not discover the danger." *Id.* On this finding, the court stated "[i]t is common knowledge that electricity is dangerous and can cause serious injury or death." *Id.* Finally, the defendant had posted warning signs, which the plaintiff had chosen to disregard. *Id.*

In *Hogate v. American Golf Corporation*, 97 S.W.3d 44 (Mo.App.E.D. 2003) the appellate court found that a person riding a bicycle onto a golf course fairway was a trespasser to whom no duty was owed and reversed a jury verdict in favor of the bicyclist. *Hogate*, 97 S.W.3d at 50. The bicyclist sustained injuries riding his bicycle onto the fourth fairway of the golf course when his bike came into contact with a yellow rope that

was strung along a newly sodded area of the fairway. *Id.* at 46. The appellate court discussed the exception stated in section 335 and noted that it was questionable whether it had been adopted in Missouri. *Id.* at 48-49. The appellate court found that regardless of whether section 335 has been adopted, the evidence did not show that the defendants knew or should have known of constant trespassing in the area where plaintiff sustained his injury. *Id.* at 49. The appellate court found that the defendants' knowledge of numerous activities on a hill adjacent to the fourth fairway, including people riding bikes, did not establish knowledge of intrusions onto the golf course by bicyclists. *Id.* The appellate court also found that the yellow rope was not a condition that would be likely to cause death or bodily harm to trespassers and that the defendant had no reason to believe that trespassers would not discover the rope. *Id.*

In *Mothershead v. Greenbriar Country Club*, 994 S.W.2d 80 (Mo.App.E.D. 1990) the appellate court affirmed the trial court's finding that uninvited sledders on the club's golf course were trespassers to whom the Country Club owed no duty. *Mothershead*, 994 S.W.2d at 87. Plaintiff alleged that the Club knew or should have known of the presence of sledders (trespassers) based on worn paths, beverage containers, and the fact that one Club employee had rode sleds on the golf course prior to his employment. *Id.* at 86-87. The appellate court rejected this argument finding the evidence insufficient to show knowledge by the club. *Id.* at 87. The court rejected the plaintiff's contention that section 335 applied because, under the facts of the case, the defendant would not have reason to believe that the danger was of such nature that trespassers would not discover it. *Id.* at 88. On this issue, the court found that the danger of the trees at the bottom of the

hill and the danger that striking one of the trees at any speed would result in serious injury was obvious. *Id.* The court held that the defendant had no duty to remove, remedy, or warn of the obvious dangerous condition. *Id.*

In *Cochran v. Burger King Corporation*, 937 S.W.2d 358 (Mo.App.W.D. 1997) the appellate court reversed a jury verdict for the plaintiff on a premises liability claim. *Cochran*, 937 S.W.3d at 365-366. The plaintiff had been injured when he attempted to climb the wall around the restaurant's dumpster area and the wall collapsed. *Id.* at 360. The appellate court found that the plaintiff was a trespasser and stated "[w]ith only limited exceptions, none of which have been pleaded or proved in this case, a trespasser takes the land 'for better or for worse' and assumes the risk of injury from the condition of the premises." *Id*. at 364. The appellate court discussed the *Seward* case and section 335 and specifically noted that the evidence was insufficient to prove "constant trespassing on a limited area." *Id*. at 365. The court noted that there was no evidence of trespassers constantly climbing on the wall and that in fact, there was no evidence that any person had attempted to climb the wall before. *Id.* The court also quoted from *Seward* that "no Missouri case has held that a landowner is liable to an adult trespasser for a *condition* on land." *Id*. at 364.

Applying section 335 to the facts of this case, considered in light of the appellate cases that have discussed section 335, it is evident that plaintiff failed to make a submissible case. Each requirement of section 335 is considered and discussed in turn.

**(1) knowledge of "constant" trespassers on a limited area of land**

Plaintiff failed to prove that the Defendants knew, or from facts within their knowledge should have known, that trespassers constantly intrude upon the limited area of land where the wire cable was across the private road on Greenfield (where plaintiff's injury occurred). In fact, plaintiff offered very little evidence on this issue. Plaintiff elicited testimony from the landowner, Burke Dodson, about general problems he had with trespassers prior to leasing the land to the Defendants in 1994. (Tr. 25-27) Plaintiff elicited testimony from the Defendants about trespassers in general on Greenfield and their other farm property. (Tr. 124-125) Defendant Dale Glenn testified that since 1994 they have had problems with trespassers on Greenfield and that they have trouble with trespassers everywhere they farm. (Tr. 124-125) He also testified that there is a fishing area on Greenfield and that he is aware that people fish there but that there is no wire cable across the road where you go to the fishing area. (Tr. 125-126) He acknowledged that he was aware that people had operated four-wheelers on that land, some with permission and some without. (Tr. 127-128)

None of the testimony elicited by Plaintiff establishes evidence of knowledge by Defendants of trespassers constantly intruding upon the limited area of land where the wire cable is across the private road where plaintiff's injury occurred. This requirement of section 335 is particularly important because it is the lynch pin to this exception. It is the knowledge of the constant trespassers in a particular area that brings forth the duty. As stated in *Seward*, the knowledge required is that "persons constantly and persistently intrude upon some *particular place* within the land." *Seward*, 854 S.W.2d at 429-430

(emphasis in original). It is not enough that he know or have reason to know that persons persistently roam at large over this land. *Id.*

**(2) the condition is one which the possessor has created or maintains and to his knowledge, is likely to cause death or serious bodily harm to such trespassers**

Like the yellow rope in *Hogate*, the wire cable in and of itself is not a condition which is likely to cause death or serious bodily harm. Rather, it was plaintiff's reckless behavior that caused the danger. An example of a condition that would satisfy this requirement would be an uninsulated high voltage electric wire, as it is the wire itself is dangerous and capable of causing death or serious bodily harm.

**(3) the condition is of such a nature that he had reason to believe that trespassers will not discover it – "hidden peril"**

A land possessor is responsible for the danger of hidden perils when they have knowledge that a person is likely to come in contact with the hidden peril. The duty owed to a trespass under section 335 is certainly no more than the duty owed to a licensee or an invitee. The duty to a licensee or an invitee applies to dangerous conditions, defined as defects or conditions that are in the nature of hidden dangers, traps, snares, pitfalls, and the like, not known and that would not be observed in the exercise of ordinary care. *Cook v. Smith*, 33 S.W.3d 548 (Mo.App.W.D. 2001); *Workes v. Embassy Food Enterprises, Inc.*, 592 S.W.2d 864, 967-868 (Mo.App.E.D. 1979). There is no duty to a licensee or invitee where the condition is open and obvious and the risk of harm exists only if the plaintiff fails to exercise due care. *Id*.; *Poloski v. Wal-mart Stores, Inc.*, 68 S.W.3d 445, 450-451 (Mo.App.W.D.2002).

The Plaintiff's evidence failed to show that the Defendants had reason to believe that a trespasser would not discover the wire cable across the private road. The wire cable across the private road on Defendants' farmland was not hidden, nor was its presence unusual or unexpected. It is common knowledge that farmers put up cables, gates, barricades, and the like to keep people from trespassing. (Tr. 43-44, 98, 115, 141, 168, 192) In fact, Plaintiff, his brother, and his brother's passenger all testified that they were aware that farmers put up cables, gates, barricades, and the like to keep people from trespassing. (Tr. 98, 115, 168) Shortly before entering Greenfield on the south entrance the four wheelers had attempted to enter on the north entrance and had turned around when they encountered the wire cable blocking the field road on the north entrance. (Tr. 74-75, 113)

Just because one person did not see the wire cable does not make it a hidden peril. Burke Dodson testified that the cable was "pretty visible" in daylight. Josh Nelson, the passenger on the ATV operated by plaintiff's brother saw the cable. (Tr. 86) The passenger on plaintiff's ATV saw the cable. (Tr. 69, 81) Charles Glenn testified that the cable was pretty visible and that it had been there since 1994 and that no one had ran into it before the plaintiff. (Tr. 198)

In fact, the jury's verdict evidences an underlying inconsistency in the verdict on this requirement. In order to find for plaintiff the jury had to make the finding that "Defendants knew or should have known the wire cable was of such a nature and location that Plaintiff would not discover it." (Instruction No. 8, L.F. 64) However, in order to find comparative fault on behalf of Plaintiff, which the jury did find, the jury had to find

that "plaintiff failed to keep a careful lookout." (Instruction No. 7, L.F. 63) If the plaintiff failed to keep a careful lookout then obviously he could have seen the wire cable if he had been paying proper attention. A plaintiff who does not see a plainly visible condition cannot come within the "hidden peril" exception to the general rule of no liability to trespassers.

**(4) the possessor has failed to exercise reasonable care to warn trespassers of the condition and the risk involved**

The risk involved in driving into a wire cable is obvious. The use of cables, gates, barricades, and the like to keep people from trespassing on private field roads on farmland is common knowledge. (Tr. 43-44, 98, 115, 141, 168, 192) The Defendants marked their property with purple paint to warn people not to trespass. (Tr. 35, 40-42, 45-48, 62, 126-127, 139, 198-199, 206) The Defendants did not fail to exercise reasonable care to warn trespassers of the condition and the risk involved.

Comment *f* to section 335 explains this requirement:

> A possessor of land is not subject to liability under the rule stated in this Section unless he has failed to use reasonable care to warn the trespassers of the condition created or maintained by him on the land and of the risk involved. The possessor is entitled to assume that trespassers will realize that no preparation has been made for their reception and will, therefore, be on the alert to observe the conditions which exist upon the land. In addition, he is also entitled to assume that they will be particularly careful to discover dangerous conditions which are inherent in the use to which the possessor puts the land. On the other hand, he is not entitled to

> assume that the trespassers will discover conditions which are unusual to land of the character upon which the trespasser intrudes, or which are due to carelessness in the maintenance of those conditions which are necessary to the use of the land, if the conditions are not readily observable by the attention which the trespasser should pay to his surroundings.

*Restatement (Second) of Torts, § 335 (1965).*

It is clear that the wire cable blocking the private field road was a condition inherent to farm land in the area. Further, it was a condition that was readily observable by a trespasser paying proper attention to his surroundings. The Plaintiff did not prove that the Defendants failed to exercise reasonable care to warn trespassers of the condition and the risk involved.

Based on the foregoing, it is clear that like *Seward*, *Politte*, *Mothershead*, *Hogate*, and *Cochran*, the facts of this case do not fit the requirements of Section 335. As a result, it was error for the trial court to deny the Defendants' motion for directed verdict, to submit Plaintiff's claim to the jury, to accept the jury's verdict, and to deny the motion for judgment notwithstanding the verdict. For these reasons, Defendants respectfully request that this Court find that Plaintiff was a trespasser on Defendants' land to whom no duty was owed and Plaintiff did not prove that he fell within any exception to the general rule that possessors of land are not liable to trespassers for conditions on the land and reverse the judgment entered in this matter

## II.

**The trial court erred in denying the motion for new trial because an instruction that does not accurately state the substantive law of the theory of liability that is the basis for the verdict and that misdirects, misleads or confuses is prejudicial error in that Instruction No. 8, the verdict directing instruction, did not follow the substantive law of section 335 as it modified the requirement that "trespassers *constantly* intrude upon a limited area of land" to "trespassers *frequently* intruded upon the South entrance to Greenfield" and as a result allowed the jury to enter a verdict without making all the necessary factual findings under section 335.**

For Point II, the Defendants challenge the trial court's denial of the motion for new trial based on instructional error in instruction no. 8, the verdict directing instruction. As explained in Point I above, Plaintiff submitted his claim based on an exception to the general rule of no liability to a trespasser set forth in Section 335 of the Restatement (Second) of Torts. Even assuming that Missouri has adopted section 335, Instruction No. 8 did not properly instruct the jury on the substantive law and allowed the jury to enter a verdict without making the necessary factual findings required by section 335. This was reversible error and the trial court's denial of the motion for new trial was erroneous.

There is no MAI for Section 335 of the Restatement (Second) of Torts, and as such, Instruction No. 8 was either a modified MAI or a "not-in-MAI" instruction. Plaintiff referred to it as a modification of MAI 22.02, which submits the "hard-by" rule.

Defendants, however, contend that it was a "not-in-MAI" instruction. Either way, appellate review is the same.

Rule 70.02 contemplates the situation in which there is no applicable MAI and provides for the modification of an existing MAI or the drafting of a "not-in-MAI" instruction. *Missouri Rule of Civil Procedure 70.02*; *Duncan v. First State Bank of Joplin*, 848 S.W.2d 566, 568 (Mo.App.S.D. 1993). The propriety of a modified MAI or a not-in-MAI instruction is determined by "whether it follows the substantive law and can be readily understood." *Murphy v. City of Springfield*, 794 S.W.2d 275, 278 (Mo.App.S.D. 1990). "The proper function of a not-in-MAI verdict director is to submit all contested factual issues necessary to support the legal proposition on which the verdict is based." *Southern Missouri Bank v. Fogle*, 738 S.W.2d 153, 157 (Mo.App.S.D. 1987).

"To reverse a jury verdict on the ground of not-in-MAI instructional error, it must appear that the offending instruction misdirected, misled, or confused the jury; the burden to prove the error rests with the party challenging the instruction." *Duncan*, 848 S.W.2d at 568. "A verdict-directing instruction is prejudicially erroneous if it fails to require a finding of all essential fact issues necessary to establish the legal proposition on which the right to the verdict is based." *Southern Missouri Bank*, 738 S.W.2d at 158.

According to Plaintiff, Instruction No. 8, the verdict directing instruction, was MAI 22.02 modified by *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo. banc 1993), *Politte v. Union Electric Co*., 899 S.W.2d 590 (Mo.App.E.D. 1995) and Restatement (Second) of Torts, Section 335. Regardless of how it is labeled, it is clear that Instruction No. 8 was an attempt to submit Plaintiff's claim based on the exception to

the general rule of no liability to trespassers stated in section 335. As set forth in Point I, Defendants contend that Missouri has not adopted section 335. However, even assuming that section 335 is the law in Missouri, Plaintiff's instruction does not accurately set forth the substantive law of section 335.

A comparison of Section 335 and Instruction No. 8 shows a deviation in the language that renders Instruction No. 8 erroneous. Section 335 states:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of land, is subject to liability for bodily harm caused to them by an artificial condition on the land if,
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers and
>
> (iii) is of such a nature that he had reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

*Restatement (Second) of Torts, §335 (1965).* Instruction no. 8, the verdict directing instruction, required the jury to find as follows:

> Your verdict must be for Plaintiff if you believe:
>
> First, Defendants knew or should have known that trespassers frequently intruded upon the South entrance to Greenfield, and

Second, Defendants installed, placed and/or maintained a wire cable across the road to the South entrance to Greenfield, and

Third, Defendants knew or should have known that the wire cable was likely to cause serious bodily harm to trespassers, and

Fourth, Defendants knew or should have known the wire cable was of such nature and location that Plaintiff would not discover it, and

Fifth, Defendants failed to use ordinary care to warn Plaintiff of the wire cable, and

Sixth, as a direct result of said failure, Plaintiff sustained damage.

(L.F. 64)

Instruction no. 8 modifies the requirement of Section 335 of the Restatement (Second) of Torts that "trespassers **constantly** intrude upon a limited area of land" to "trespassers **frequently** intruded." (L.F. 64) This modification is a critical change in the substantive law, rendering the instruction prejudicially erroneous. This is clear from the discussion of section 335 in the various cases appellate cases in which it has been addressed. In four of the five cases the evidence was found to be insufficient to prove that the defendant had knowledge of "constant" trespassers in a limited area. *Seward*, 854 S.W.2d at 429-430; *Politte*, 899 S.W.2d at 593; *Hogate*, 97 S.W.3d at 49; *Cochran*, 937 S.W.2d at 364. In *Politte*, the evidence did not show that the possessor of the land knew or should have known of constant intrusion on the land and the intrusions that were shown did not involve the artificial condition by which plaintiff received his injury. *Politte*, 899 S.W.2d at 593. In *Hogate*, the evidence did not show that the defendants

knew or should have known of constant trespassing in the area where plaintiff sustained his injury. *Hogate*, 97 S.W.3d at 49. In *Cochran*, the evidence was insufficient to prove "constant trespassing on a limited area." *Cochran*, 937 S.W.2d at 365.

In *Seward v. Terminal R.R. Ass'n*, 854 S.W.2d 426 (Mo. banc 1993) the Supreme Court found that the evidence in that case was not sufficient to establish "constant trespassing on a limited area" and explained this requirement, stating:

> Before a duty arises, the defendants must have some notice that 'persons constantly and persistently intrude upon some *particular place* within the land. It is not enough that he know or have reason to know that persons persistently roam at large over this land.

*Seward*, 854 S.W.2d at 429-430 (emphasis in original).

It is clear that Instruction No. 8, the verdict directing instruction in this case, is not an accurate statement of the substantive law. It is also clear that any deviation from section 335 takes the case out of that limited exception and out of that theory of liability. The verdict directing instruction did not required the jury to make the correct finding as to all of the essential elements for the theory of liability set forth in Restatement (Second) of Torts, section 335. This instructional error constitutes reversible error. As such, it was error for the trial court to submit the instruction to the jury, error for the trial court to accept the jury's verdict based on the erroneous and misleading instruction, and error for the trial court to deny the motion for new trial.

Defendants respectfully request that this Court find that Instruction No. 8, the verdict directing instruction, was prejudicially erroneous because it did not accurately state the substantive law of section 335 and reverse and remand this case for a new trial.

## CONCLUSION

Based on the facts, law and argument offered in this brief in support of this appeal, Appellants/Defendants respectfully requests that this Court find that Plaintiff was a trespasser on Defendants' land to whom no duty was owed; find that Plaintiff did not prove that he fell within any exception to the general rule that possessors of land are not liable to trespassers for conditions on the land; and reverse the judgment entered in this matter.

In the alternative, if this Court finds that section 335 has been adopted by Missouri and plaintiff made a sufficient case to submit that theory of liability to the jury, then Defendants respectfully request that this court find that Instruction No. 8, the verdict directing instruction, was prejudicially erroneous because it did not accurately state the substantive law of section 335 and reverse and remand this case for a new trial.

Respectfully submitted,

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## RULE 84.06(c) CERTIFICATE OF COMPLIANCE

Albert C. Lowes, counsel for Appellants, pursuant to Rule 84.06(c) hereby certifies to this Court that:

1. The brief filed herein on behalf of Appellants contains the information required by Rule 55.03.

2. The brief complies with the format requirements of Rule 30.06 and 84.06 (a) and (b).

3. The brief complies with the page limits of Rule 360.

4. The number of words in this brief, according to the word processing system used to prepare the brief, is 7458, exclusive of the cover, certificate of service, this certificate, the signature block and the appendix.

5. In compliance with Rule 84.06(g) and Rule 361 a floppy disk is filed with the brief that complies with Rule 84.06(g) and Rule 361 and said disk has been scanned for viruses and, according to the program used to scan for viruses, the disk is virus-free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) copies of Appellant's Brief and one (1) floppy disk was served upon the following attorney of record by sending same by U.S. mail, first class postage prepaid, this _____ day of October, 2003:

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# APPENDIX

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